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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

RICHARD C. PRICE,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO
LOCAL UNION No. 4028

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD

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UNITED STEELWORKERS OF AMERICA, AFL-CIO
LOCAL UNION NO. 4028

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Richard C. Price, petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit denying a petition for review of the order of the National Labor Relations Board.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 373 F.2d 443. It is reproduced in the Appendix to

this petition. The Board's decision and order is reported at 154 NLRB 692.

JURISDICTION

The judgment of the Court of Appeals was entered on February 20, 1967. By order dated May 4, 1967, and signed by the Honorable William O. Douglas, Associate Justice of this Court, the time for filing a petition for certiorari in this cause was extended to and including July 20, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The principal question presented is whether a labor organization which fined a member $500 and suspended him from union membership for five years because the member violated a union rule prohibiting the filing of a petition with the National Labor Relations Board seeking the decertification of the labor organization as a bargaining representative, committed an unfair labor practice under Section 8(b)(1)(A) of the National Labor Relations Act.[1]

[1] In addition, the following subsidiary question is presented:

> Whether, in interpreting Section 8(b)(1)(A) of the National Labor Relations Act, when a labor organization imposes a monetary fine upon a union member for violating a union rule, the subsequent withdrawal of the fine after the member had filed with the National Labor Relations Board an unfair labor practice charge protesting the fine's imposition, renders the fine nonoperative.

This question is so directly related to the principal question that, if Price's position with respect to the latter should be accepted, it would be appropriate for the Court also to review the subsidiary question. In order to preserve Price's position with respect to the latter issue, the matter is specifically adverted to herein.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151, *et seq.* (herein called "the Act"), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

* * * *

Sec. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . .

* * * *

REPRESENTATIVES AND ELECTIONS

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit ap-

propriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

* * * *

Sec. 9 (c) (1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees . . . (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * *

Sec. 9. (e) (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the em-

ployees in such unit and certify the results thereof to such labor organization and to the employer.

* * * *

STATEMENT OF THE CASE

In this case the Court of Appeals sustained a decision of the National Labor Relations Board in which the Board dismissed a complaint against United Steelworkers of America, Local No. 4028, AFL-CIO, herein called "the Union." The complaint alleged that the Union had, within the meaning of Section 8(b)(1)(A) of the Act, restrained and coerced Price, the Petitioner herein, because Price had filed petitions with the Board seeking the Union's decertification as a bargaining representative.

A. The Facts

For many years Pittsburgh-Des Moines Steel Company and the Union have been parties to, and have maintained in effect, a series of collective bargaining contracts covering employees at the Santa Clara, California, plant of Pittsburgh-Des Moines. One such contract, effective from September 1, 1962, to September 1, 1964, contained a union security provision requiring all employees who became members of the Union after September 1, 1962, and all employees hired after that date who completed a 30-day probationary period of employment, to pay, as a condition of their continued employment, union membership dues during the contract's term. A successor agreement between the parties, operative from September 1, 1964, to September 1, 1967, contained a similar union security provision.

Price first became an employee of Pittsburgh-Des Moines in 1951. Thereafter, except for a two-year

period of military service, Price worked at the Santa Clara plant continuously through the year 1964. Price was subject to the union security provisions in both the 1962 and 1964 contracts; he was a dues-paying member of the Union from 1951 until June 10, 1964.

On April 15, 1964, Price filed with the Regional Director of the Board's Twentieth Region a formal petition to rescind the authority of the Union to enter into a union security provision covering employees at the Santa Clara plant. Price, however, made a mistake in filing this petition. He actually had intended to file a petition to decertify the Union; that is, to establish by an election that the Union did not have the requisite support to represent the employees at the Santa Clara plant for collective bargaining purposes. Accordingly, Price, having received the Regional Director's permission, withdrew his deauthorization petition, and, on June 3, 1964, filed a second petition in which he in fact sought the decertification of the Union by the Board.

On May 13, 1964, three Pittsburgh-Des Moines employees, who were also Union members, filed a charge with the Union against Price. The charge alleged that Price had violated the Steelworkers' Constitution by filing the deauthorization petition with the Board.[2] On June 1, 1964, Price appeared before the Union's Trial Committee. The Committee found Price guilty as

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[2] Price was charged with violating Article XII, Section 1(d) of the Steelworkers' Constitution, which provides:

> Any member may be penalized for committing any one or more of the following offenses:
>
> . . . advocating or attempting to bring about the withdrawal from the International Union of any Local Union or any member or group of members . . . .

charged, and recommended that penalties be imposed on him. On June 10, 1964, the Union's general membership approved and accepted the Trial Committee's findings and recommendations, and thereby imposed on Price the following penalties: (1) suspension from membership in Local 4028 for five years; (2) preclusion from attending Local 4028's meetings for five years; (3) a fine of $500 plus costs of the hearing before Local 4028's Trial Committee; and (4) indefinite suspension from membership in Local 4028 pending payment of the $500 fine.

Price's reaction to the penalties thus imposed was twofold: he appealed the Union's action to the Executive Board of the Steelworkers International Union; and, on June 11, 1964, he filed with the Board an unfair labor practice charge. As a result of Price's unfair labor practice charge, the Board's General Counsel, on November 5, 1964, issued an unfair labor practice complaint alleging that the Union had violated Section 8(b)(1)(A) of the Act. Thereafter, on November 23, 1964, the Steelworkers' Executive Board withdrew the $500 fine, but left in full effect the other penalties imposed on Price. Price was privileged to appeal the Executive Board's decision; the time to file such an appeal expired, however, without Price exercising the privilege.

The Board held that the Union's disciplinary action against Price because he had invoked the Board's decertification procedures was not an unfair labor practice within the meaning of Section 8(b)(1)(A) of the Act, and it ordered the dismissal of the complaint against the Union (154 NLRB 692).

B. The Decision of the Court of Appeals

Pursuant to Section 10(f) of the Act, Price petitioned the United States Court of Appeals for the Ninth Circuit to review and set aside the Board's Decision and Order.[3] The Court of Appeals denied Price's petition.

The Court of Appeals, agreeing with the Board, regarded the fine the Union levied against Price as "not an operative factor" in the case. Thus, in the Court's view, because it "would not have become relevant until the end of the period of [Price's] suspension," the fine was "in effect a fee for readmission, not a straight fine enforceable in court." Accordingly, the Court found it unnecessary to decide whether the Union's fining of Price was outlawed by Section 8(b)(1)(A) of the Act (App., *infra*, p. 21).[4]

The Court of Appeals concluded that Price's five-year suspension from union membership, although constituting restraint and coercion within the meaning of Section 8(b)(1)(A), was privileged by the proviso to that Section. In the Court's view, Price's suspension did not affect his job or other economic rights, and involved only an internal union affair—the kind of matter with which Congress had not intended the Act to interfere (App., *infra*, pp. 22). The Court noted in this connection that the Board had been "discriminating" in its application of the

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[3] The Union moved, and was granted permission, to intervene as a party respondent in the court below.

[4] Although it was stipulated that Price was subject to the applicable union security provisions of the contracts between the Union and Pittsburgh-Des Moines, the Court of Appeals assumed that Price's membership in the Union was voluntary (App., *infra*, pp. 18-19).

proviso, and that in such cases as *Local 138, Operating Engineers (Charles S. Skura)*, 148 NLRB 679, and *Wellman-Lord Engineering, Inc.*, 148 NLRB 674, *enforced sub nom., Roberts v. N.L.R.B.*, 350 F.2d 427 (C.A.D.C.), the Board had held that unions could not discipline members who had invoked the Board's processes to charge the unions with the commission of unfair labor practices. The Court distinguished such cases as involving instances where union members were "asserting individual rights granted . . . against the union," and, in such circumstances, "the union could not discipline the member for taking his case to a tribunal set up by law to vindicate his rights." By contrast, according to the Court of Appeals, the Union's retaliatory action against Price was permissible because Price was "attacking the union's existence or its position as bargaining agent vis-á-vis a particular employer" (App., *infra*, pp. 22-23).

REASONS FOR GRANTING THE WRIT

1. The fundamental issue presented by this petition is whether the exercise of a statutory right—the right to file a petition with the Board—is to be subordinated to the privilege of a labor organization to act as exclusive bargaining representative of a group of employees. Price, by filing a decertification petition with the Board, invoked his right to raise a question concerning representation in the bargaining unit where he was employed. The Union, by its fine and suspension, effectively destroyed that right, both as to Price and his fellow employees, and immunized its exclusive bargaining status from question by those most directly concerned, the members of the bargaining unit.

The Act gives employees the right to petition for union decertification. Section 7 gives to employees the right to join or assist labor organizations, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection; it likewise gives them the "right to *refrain from any or all of such activities.*" The "right to refrain" becomes illusory if employees, having once designated a bargaining representative or authorized a union security agreement, are thereafter precluded from withdrawing the authority they have bestowed. The procedure set forth in Section 9(c)(1)(A)(ii) of the Act not only is a tool in effectuating the employee "right to refrain," but it also denotes an additional employee statutory right—the right to petition for union decertification. Thus, with respect to the employee right to decertify, the pertinent House Report, H. Rep. No. 245, 80th Cong., 1st Sess. 35, 1 *Legislative History of the Labor Management Relations Act of 1947*, page 326, stated:

> Although the terms of the Act would permit them to do so, the Board has denied to employees who have designated an exclusive representative the *right* to have it decertified unless, at the same time, they subject themselves to control by another representative. The bill restores to employees this *right* of which the Board deprived them .... [Emphasis added.]

The decision of the Court of Appeals ignored Price's statutory rights to refrain from union activity and to petition the Board for union decertification. The existence of the latter statutory right casts grave doubt upon the soundness of the Court's characterization of the disciplining of Price as merely an internal union affair. Price was entitled, at the very least, to

Court consideration of the 8(b)(1)(A) "internal union affairs" concept in the light of an employee's unquestioned statutory right to invoke the Board's processes to bring about union decertification.

2. Whether a union member has an absolute right of access to the Board's processes, and whether such right may not be impaired by union discipline in the form of suspension from membership or fines imposed pursuant to a union rule, are questions of major importance in the interpretation and administration of the Act.

In *National Labor Relations Board* v. *Allis-Chalmers Manufacturing Company, et al.*, —— U.S. —— (June 12, 1967), 35 U.S.L.W. 4623, this Court interpreted Section 8(b)(1)(A) of the Act and upheld a union rule—enforced by the imposition [5] of reasonable fines [6] and by bringing court suit for their collection—prohibiting union members from crossing picket lines and going to work during a strike against their employer. The union rule in *Allis-Chalmers*, like the

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[5] As indicated, *supra*, page 2, also in issue in this case is the soundness of the conclusion of the court below that the Union's withdrawal of the $500 fine imposed on Price rendered the fine nonoperative. Thus, as the Third Circuit said in *Local 542, International Union of Operating Engineers, AFL-CIO* v. *N.L.R.B.*, 328 F.2d 850, 852-853, *cert. denied*, 379 U.S. 826, the test of intimidation and coercion within the meaning of Section 8(b)(1)(A) of the Act "is not whether the conduct proves effective. The test is whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act."

[6] Whether the $500 fine imposed on Price was "reasonable" is open to question. See Mr. Justice Black's dissenting opinion in *Allis-Chalmers* (35 U.S.L.W. at 4632).

union rule in question in this case, was a rule in derogation of the Section 7 "right to refrain" from union activities. The Court's holding in *Allis-Chalmers*, as the majority opinion made clear, rests principally on the premise that the body of Section 8(b)(1)(A) was not meant to regulate rules pertaining to "the internal affairs of unions" (35 U.S.L.W. at 4626-4628). But as the concurring opinion of Mr. Justice White also made clear, the Court's holding does not validate all union rules in derogation of Section 7 rights:

> I do not mean to indicate, and I do not read the majority opinion otherwise, that every conceivable union rule which impinges upon § 7 rights of union members is valid and enforceable by expulsion and court action. There may well be some union rules which on their face are wholly invalid and unenforceable (35 U.S.L.W. at 4630).

The dissenting opinion of Mr. Justice Black in *Allis-Chalmers*, joined in by three other Justices, likewise indicates that not all union rules may be validated under the "internal union affairs" concept.

The union rule in question in this case—a rule which not only is in derogation of the Section 7 "right to refrain," but is also in derogation of the implementing Section 9(c)(1)(A)(ii) right to invoke the Board's processes—is a rule which this Court's holding in *Allis-Chalmers* clearly did not reach. And, to the extent that the rule herein precludes access to the Board's processes, the rule was, arguably, of no legitimate concern to the Union and beyond the competence of the Union to enforce. Thus, as the Board said in *Local 138, Operating Engineers (Charles S. Skura)*, 148 NLRB 679, 682, a case in which the Board held

that a union violated Section 8(b)(1)(A) of the Act by imposing a fine upon a union member for having filed with the Board an unfair labor practice charge alleging that the union had unlawfully discriminated against him:

> By the rule under consideration here, however, Respondent attempted to regulate its members' access to the Board's processes. Considering the overriding public interest involved, it is our opinion that no private organization should be permitted to prevent or regulate access to the Board, and a rule requiring exhaustion of internal union remedies by means of which a union seeks to prevent or limit access to the Board's processes is beyond the lawful competency of a labor organization to enforce by coercive means.

3. The decision of the court below, in reasoning, principle, and result, is in conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Roberts* v. *N.L.R.B.*, 350 F.2d 427. There, an employee was fined $450 by a union because, prior to exhausting his internal union remedies, he had filed with the Board unfair labor practice charges alleging that the union had unlawfully discriminated against him. The Board held (*Wellman-Lord Engineering, Inc.*, 148 NLRB 674) that the union's action violated Section 8(b)(1)(A) of the Act. The Court of Appeals enforced the Board's order. "[T]he right of an employee to file charges," the Court assumed, "is protected under Section 7" (350 F.2d at 428). The Court also rejected the argument that the union's action against the employee could be validated as "an internal union affair," saying (350 F.2d at 429):

> In other words, by filing a charge with the Board in this case Martin stepped beyond the internal affairs of the Union and into the public domain.

> The Act, in enabling the Board to inhibit the Union from penalizing him for doing so keeps open the channels created by Congress for the administration of a public law and policy. This is not, we agree with the Board, an inroad upon those internal union affairs left by the Act and its policy to be administered solely by the Union.

Finally, the Court of Appeals noted that the language of the proviso to Section 8(b)(1)(A) could not justify the union's action, saying (350 F.2d at 427, n.2): ". . . the imposition of the fine in this case was too remote from a rule with respect to the acquisition or retention of membership to be protected by the mere language of the proviso." [7]

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[7] The decision of the District of Columbia Circuit in the *Roberts* case is itself in square conflict with the decision of the Third Circuit in *Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, and its Local 22* v. *N.L.R.B.*, —— F.2d ——, 65 LRRM 2629. There, the Third Circuit refused to enforce a Board order under Section 8(b)(1)(A) against a union which had expelled from membership an employee-union member who had filed NLRB unfair labor practice charges against the union. The Third Circuit: (1) refused to view "public policy as justification for engrafting upon section 7 a general right of unlimited access to the Board" (65 LRRM at 2632); and (2) held that the proviso to Section 8(b)(1)(A) "protected" the union's action because the union rule in question "required only that the union be given a fair opportunity to correct its own wrong [through an intra-union appeal] before the injured member should have recourse to the Board" (65 LRRM at 2632).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: July 20, 1967

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20,653

RICHARD C. PRICE,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

[February 20, 1967]

Petition to Review an Order of the National Labor Relations Board

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Before: BARNES and DUNIWAY, Circuit Judges, and MATHES, District Judge

DUNIWAY, Circuit Judge:

Price seeks review of a decision of the National Labor Relations Board, which dismissed a complaint based upon his charge that United Steel Workers of America, Local 4028, AFL-CIO, had been guilty of unfair labor practices. The particular portion of the statute upon which he relies is section 8(b)(1)(A) of the National Labor Relations Act as amended (29 U.S.C. § 158(b)(1)(A)).[1]

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[1] "(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph

The facts were stipulated. Price worked for Pittsburgh-Des Moines Steel Company at its Santa Clara, California plant, starting in 1951. As far as the record shows he still works there. The union and the employer had entered into a series of collective bargaining agreements, and at the time Price filed his charge with the Board such an agreement was in effect covering the period September 1, 1962, to September 1, 1964.[2] Price had been a dues paying member of the union ever since 1951.

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shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . . ."

Section 7 provides:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

[2] The agreement contained the following union security provision:

"All eligible employees who after September 1, 1962, become members of the Union and all employees hired after that date, upon completion of their probationary period (thirty (30) days), as a condition of continued employment shall pay initiation fees and Union dues until September 1, 1964, ..."

It is stipulated that Price was subject to this provision. Except for the fact that this provision was attacked in the first petition that Price filed with the Board, we cannot see its materiality. It is also stipulated that Price was a dues paying member of the union from 1951 on. Whether he joined the union because of a comparable provision in an earlier contract does not appear. We assume that he joined because he wanted

On April 15, 1964, Price filed a petition with the Regional Director of the Board to rescind the authority of the union to enter into a union security arrangement covering the employees at the Santa Clara plant.[3] He made a mistake, for his actual intent was to file a petition for decertification of the union as the bargaining representative of the employees. He corrected his petition by filing a withdrawal on April 22, 1964. This was approved by the Board's representative on April 24, 1964. On June 3, 1964, Price filed a petition to decertify.[4] The Teamsters Union filed a separate petition on June 12. On August 6, 1964, the union, the Teamsters, the employer and Price entered into an agreement for a consent election. The election was held on August 14, 1964, and the Steelworkers won. The results of the election were certified by the Regional Director on August 24, 1964. A new agreement was entered into between the employer and the union covering the period September 1, 1964 to September 1, 1967.[5]

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to. The only clause before us does not require that he join—it does not even, on its face, require that he pay dues. He neither joined the union nor was hired after September 1, 1962.

[3] Section 9(e)(1) of the Act; Rules and Regulations of the National Labor Relations Board, Series 8, as amended—part 102, subpart E, §§ 102.83-8.

[4] Section 9(c) of the Act; Rules and Regulations, *supra*, Subpart C; §§ 102.60 et seq.

[5] This contract had the same union security provision as the 1962 contract, and Price was bound by it in the same way—whatever that be taken to mean. Perhaps, because he has been suspended from membership, it can be said to require that he pay dues. See, however, note 2, *supra*. The record is silent

On May 13, 1964—after Price's first petition and before his corrected petition—three members of the union, all employees of the employer, filed charges with the union alleging that Price's first petition violated the union's constitution. The relevant sections are Article XII, section 1(d): "Any member may be penalized for committing any one or more of the following offenses: . . . (d) advocating or attempting to bring about the withdrawal from the International Union of any Local Union or any member or group of members; . . ." and Article XII, Section 2: "Any member convicted of any one or more of the above offenses may be fined, suspended, or expelled."

Price was tried by the union's trial committee on June 1, 1964, two days before he filed his petition to decertify and after he had withdrawn his first petition. He was found guilty, and the trial committee recommended that he be (1) suspended from membership and precluded from attending meetings for 5 years; (2) fined $500 plus costs of the hearing; and (3) suspended from membership completely pending payment of the fine. On June 3, 1964, the membership adopted these recommendations. Price appealed to the Steelworkers International Executive Board. The Board withdrew the fine on November 23, 1964.[6] Price could have taken a further appeal to the International Convention, but did not.

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as to this. At oral argument, the union and the Board seemed to be in agreement that Price was not paying, and was not expected to pay, dues while suspended.

[6] Nothing explicit was said about withdrawing the costs of hearing penalty. Apparently the costs were considered part of the fine and withdrawn. The union has indicated on this appeal that nothing has been or will be done to collect the costs.

Price filed his unfair labor practice charge with the Board on June 11, 1964, alleging that the union's discipline had coerced and restrained his exercise of section 7 rights in violation of section 8(b)(1)(A). A complaint issued on November 5, 1964. In its answer and amended answer, the union admitted the disciplinary action taken and alleged that the International had withdrawn the fine. The Board found that the union had not violated the Act, and ordered the complaint dismissed.

The Board held that because the fine had been withdrawn at a time when Price was not obligated to pay it, the mere levy of the fine was not an operative factor in this case. We agree. The fine would not have become relevant until the end of the period of suspension. It was in effect a fee for readmission, not a straight fine enforceable in court. Thus this case is unlike *Allis-Chalmers Mfg. Co.* v. *NLRB*, 7 Cir., 1966, 358 F.2d 656, *cert. granted* Oct. 10, 1966, 385 U.S. 810, and *Associated Home Builders of the Greater East Bay, Inc.* v. *NLRB*, 9 Cir., 1965, 352 F.2d 745. In *Allis-Chalmers* the fines were enforceable in court and in *Associated Home Builders* the fines were subtracted from dues. We need not and do not decide under what circumstances the proviso to section 8(b)(1)(A) may permit a union to fine its members.

The question that remains is whether the union's action in suspending Price from membership for five years because he attempted to have the union decertified is an unfair labor practice under section 8(b)(1)(A). The Board held that it is not, and we agree. We think that the proviso to paragraph (A) requires this result. The Act uses the words "restrain or coerce." We have no doubt that the suspension of Price

may be considered a form of restraint or coercion. But the proviso is a part of the sentence in which those words appear, and therefore, even if the union's action be restraint or coercion, it is not unlawful if it falls within the proviso.

Here, the union's action was taken under provisions of its constitution that expressly deal with retention of membership in the union. And the union's action affected only Price's membership. It did not affect his job, or, so far as appears, any other economic rights. The union's action falls within the literal language of the proviso. It also, we think, falls within the purpose of the proviso. The legislative history of the proviso shows that it was designed to make it clear that in passing section 8(b)(1)(A) Congress was not trying to interfere with the internal affairs of unions, but was trying to outlaw coercive and restraining acts of unions attempting to organize unorganized employees. (See Legislative History of the Labor Management Relations Act of 1947 (G.P.O. 1948) at pp. 1139, 1141, 1200; 93 Cong. Rec. 4398, 4400, 4433.)

The Board has been discriminating in its application of the proviso. In a series of cases in which unions attempted to discipline their members for filing unfair labor practice charges against them, the Board has refused to apply the proviso. *Local 138, Operating Engineers and Charles S. Skura*, 148 NLRB 679 (1964); *H. B. Roberts and Local 925, Operating Engineers [Wellman-Lord Engineering, Inc.] and Wallace J. Martin*, 148 NLRB 674 (1964) enforcement granted sub nom, *Roberts* v. *NLRB*, D.C. Cir., 1965, 350 F.2d 427; *Wood, Wire and Metal Lathers Union and Phillip A. Contreras, Jr.*, 156 NLRB No. 93 (Jan. 18, 1966); *Houston Typographical Union No. 87 and*

Don P. Bosworth, 158 NLRB No. 104 (May 20, 1966); *Cannery Workers Union of the Pacific (Van Camp Sea Food Co., Inc.)*, 159 NLRB No. 47 (June 21, 1966). See also *Ryan* v. *I.B.E.W.*, 7 Cir., 1966, 361 F.2d 942. In each of these cases, the union member was not attacking the union's existence or its position as bargaining agent vis-á-vis a particular employer. Rather, the union member was asserting individual rights granted to him by law as against the union, whose existence was not threatened. In each case, the union was charged with a violation of law. In each case, the Board or the Court held that the union could not discipline the member for taking his case to a tribunal set up by law to vindicate his rights.

Price relies heavily on these cases. The Board distinguishes them, and we think properly. Price did not accuse the union of violating any provision of law. He sought to attack the union's position as bargaining agent, which is, as the Board says, in a very real sense an attack on the very existence of the union. We think that, at the least, the proviso was intended to permit the union to suspend or expel a member who takes such a position. Otherwise, during the pre-election campaign, the member could campaign against the union while remaining a member and therefore privy to the union's strategy and tactics. We can see no policy reason for requiring the union to retain a member who takes such a position. See *Tawas Tube Products, Inc. and Harold Lohr and United Steelworkers*, 151 NLRB 46 (1965).

We express no opinion as to whether, if the discipline had been more severe, the result should be different.

Petition denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

RICHARD C. PRICE, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD
and
UNITED STEELWORKERS OF AMERICA, AFL-CIO,
LOCAL UNION NO. 4028

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR RESPONDENT, UNITED STEELWORKERS OF AMERICA, AFL-CIO, LOCAL UNION NO. 4028

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MEMORANDUM FOR RESPONDENT, UNITED STEELWORKERS OF AMERICA, AFL-CIO, LOCAL UNION No. 4028

Respondent, United Steelworkers of America, AFL-CIO, Local Union No. 4028 (hereafter "the Union"), although believing that the court below reached the correct result, agrees with petitioner that the case presents issues worthy of review by this Court. The Union submits, however, that those issues are not accurately stated in petitioner's "questions presented" (Pet., p. 2).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

In our view, the questions presented by this case which warrant review by this Court are as follows:

1. Does the proviso to Section 8(b)(1)(A) of the Labor-Management Relations Act of 1947 exempt from the scope of Section 8(b)(1)(A) all suspensions of union membership, regardless of the reason for the suspension?

2. If not, and the validity of suspension depends upon the validity of the reason therefor, does a union violate Section 8(b)(1)(A) by suspending one's membership for filing a petition to decertify the union?

REASONS FOR REDEFINING THE QUESTIONS PRESENTED

The Union both suspended petitioner's membership and fined him for filing a petition with the NLRB to decertify the Union. However, petitioner took an appeal to the Union's International Executive Board, which reversed the imposition of the fine.

Petitioner's charge to the NLRB alleged that both the suspension and the fine violated Section 8(b)(1)(A). The NLRB found, however, that in view of the reversal of the fine it never became operative. That finding was affirmed by the court below (Pet. App., p. 20). Neither the NLRB nor the court below thought that the validity of the fine was an issue in this case, and neither passed upon it (*Ibid*).

Petitioner attempts to make the validity of the fine an issue in this Court. However, in view of the factual findings by the NLRB and the Court below, that issue is not squarely presented in this case. Accordingly, the issues upon which certiorari should be granted should be those relating to the suspension of petitioner's membership, as set forth above in our "Counter-Statement of Questions Presented".[1]

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[1] If the validity of the fine *were* squarely presented, we would agree with petitioner that the issue is worthy of review by this Court. The Union made clear when it imposed the fine that the sole means of enforcement would be continued suspension from membership (Pet. App., p. 20). There would thus be presented an issue much dis-

REASONS FOR GRANTING THE WRIT

Whether expulsion or suspension of membership can ever violate Section 8(b)(1)(A) is a question of great practical importance. In recent years, there has developed a divergence of views on the question, with two conflicting interpretations of the Act obtaining some currency. We agree that certiorari should be granted, so that this conflict can be resolved.

The two conflicting interpretations are reflected in the positions which we and the NLRB ("the Board") have taken in this litigation. Our view, very simply, is that the proviso to Section 8(b)(1)(A) removes *all* expulsions and suspensions, regardless of the reasons therefor, from the ambit of Section 8(b)(1)(A). In the Board's view, however, the proviso to Section 8(b)(1)(A) protects only those expulsions and suspensions imposed for reasons which the Board considers valid or desirable. In this case, the Board exonerated us because it approved of the reason why we suspended petitioner. We believe we were entitled to exoneration because, regardless how laudable our reason, the *means* we used—suspension from membership—is protected by the proviso.

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cussed, but not clearly decided, in *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (June 12, 1957): whether a fine enforceable only by expulsion is protected by the proviso to Section 8(b)(1)(A). The opinion of the Court declared that such a fine is protected by the proviso, 388 U.S. at 191-92; the dissenting opinion refrained from deciding the question, 388 U.S. at 203, 214; and Mr. Justice White was of the view that the validity of such a fine would depend upon the validity of the purpose for which it was imposed, 388 U.S. at 198. Inasmuch as fines enforceable by expulsion are one of the most common forms of union discipline, the validity of such fines is a question of great practical importance and the unsettled state of the law on this issue in the wake of the three opinions in *Allis-Chalmers* warrants early resolution by this Court.

While both the literal language of the proviso and its legislative history[2] make perfectly clear that ours is the correct interpretation, the Board has recently persuaded one court of appeals to adopt its view, thus creating a conflict among the circuits which should be resolved by this Court. The Seventh Circuit has squarely held that, as we contend, the proviso saves expulsions regardless of the reason therefor. *American Newspaper Publishers Association* v. *NLRB,* 193 F.2d 782, 800 (7th Cir. 1951), *cert. denied* 344 U.S. 812 (1952):

> "Under [the proviso] Congress left labor organizations free to adopt any rules they desired governing membership in their organization. Members could be expelled for any reason and in any manner prescribed by the organization's rules, so far as Section 8(b)(1)(A) is concerned. This interpretation has support in the legislative history of the Act . . . It is not within the power of the courts to write into this section of the Act, by interpretation, language which would broaden its scope."[3]

Only a few months ago, however, the Third Circuit, declaring that "the proviso does not enable a union to promulgate any rule it desires and hinge membership upon adherence," held violative of Section 8(b)(1)(A) expulsion for a purpose deemed undesirable by the Board. *Philadelphia Moving Picture Machine Operators' Union* v. *NLRB,* —— F.2d ——, 65 LRRM 3020, 3022 (3rd Cir. August 1, 1967). The court below walked a tightrope between these competing interpretations. It ruled that "the Union's action falls within the literal language of the proviso" (Pet. App. 21). But it also recognized that "the Board has been dis-

[2] See, e.g., legislative history quoted in *Allis-Chalmers, supra* n.1, 388 U.S. at 184-90.

[3] The Seventh Circuit reiterated this view in *Allis-Chalmers* v. *NLRB,* 358 F.2d 656, 658, 659 (7th Cir. 1966); *reversed on other grounds* 388 U.S. 175 (June 12, 1967).

criminating in its application of the proviso" (*Ibid*), and it withheld comment on the propriety of the Board's approach.

We expected that the decision last term in *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (June 12, 1967) would put an end to this controversy. As we read the three opinions in *Allis-Chalmers*, eight members of this Court indicated clearly their view that expulsions cannot violate Section 8(b)(1)(A), while only one member adopted the Board's view that validity turns on the purpose of the expulsion.[4] However, it is apparent that our reading of *Allis-*

[4] Both the opinion of the Court, by Mr. Justice Brennan, and the dissenting opinion, by Mr. Justice Black, appear to hold that those kinds of discipline protected by the proviso cannot violate Section 8(b)(1)(A). (While there is some disagreement between the two opinions as to what kinds of discipline fall within the proviso, both opinions assume that expulsion does). Only the concurring opinion of Mr. Justice White adopts the Board's view that the validity of the discipline depends upon the validity of its purpose.

The opinion of the Court states: "[T]he proviso to § 8(b)(1)(A) preserves to the union the power to expel the offending member", 388 U.S. at 183. See also 388 U.S. at 191-92: "At the very least it can be said that the proviso preserves the rights of unions to impose fines, as a lesser penalty than expulsion, and to impose fines which carry the explicit or implicit threat of expulsion for nonpayment."

The dissenting opinion states: "In the present case, the Board distinguished [cases where it has found violations] on the ground that the union rules involved there were 'beyond the competence of the union to enforce' and were 'not the legitimate concern of a union' . . . My Brother WHITE seems to take a similar position in resting his concurrence on the Court's holding that the union rule against crossing a picket line is 'valid'. But neither Congress' aim in § 8(b)(1)(A) of proscribing certain means used to accomplish legitimate ends, nor the Court's view that Congress intended no interference with internal union affairs, would allow the application of the Section to depend on the Board's or this Court's views of whether a particular internal union rule is 'valid' or not." 388 U.S. at 213, n.22.

The contrary view of Mr. Justice White appears at 388 U.S. at 198: "I do not mean to indicate, and I do not read the majority opinion otherwise, that every conceivable internal union rule which impinges upon the § 7 rights of union members is valid and enforceable by expulsion and court action. There may well be some internal union rules which on their face are wholly invalid and unenforceable."

Chalmers is not shared by the Board, which continues to seek enforcement of its orders condemning expulsions,[5] nor by the Third Circuit, which enforced such an order and found *Allis-Chalmers* no barrier.[6]

In view of the recurring nature of this issue, and the importance of clarification so that unions may know the lawful limits of the discipline they may impose, we agree that certiorari should be granted in this case.

CONCLUSION

For the reasons set forth hereinabove, certiorari should be granted, limited to the issues set forth in the "Counter-Statement of Questions Presented," *supra*.

Respectfully submitted,

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[5] See, e.g. *NLRB* v. *Cannery Workers of the Pacific*, pending as No. 21,680 in the Court of Appeals for the Ninth Circuit.

[6] *Philadelphia Moving Picture Union, supra*, 65 LRRM at 3022.

In the Supreme Court of the United States

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NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

The basic question presented by the petition is whether a union restrains or coerces employees, within the meaning of Section 8(b)(1)(A) of the National Labor Relations Act,[1] by suspending a member for filing with the National Labor Relations Board a petition for decertification of the union as the representative of the employees in the collective bargaining unit in which he works. The Board held that the union's

[1] Section 8(b)(1)(A) makes it an unfair labor practice for a labor organization "to restrain or coerce * * * employees in the exercise of the rights guaranteed in section 7." Section 7, in turn, guarantees employees the right "to form, join, or assist labor organizations," and also the right "to refrain from any or all of such activities."

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action did not violate Section 8(b)(1)(A) (154 NLRB 692), and the court of appeals sustained the Board's conclusion (Pet. 16–22).

The Board has held, however, that a union does violate Section 8(b)(1)(A) by disciplining an employee-member for filing unfair labor practice charges with the Board without first exhausting internal union procedures. Its rationale is that, since the agency may proceed against unfair labor practices only in response to charges filed with it, the right to file such charges is necessary for the vindication of rights guaranteed by Section 7, and therefore is protected by that Section; and that a union's disciplining of a member for filing a charge accordingly "restrains" or "coerces" him in the exercise of his Section 7 rights. See *Local 138, Int'l Union of Operating Engineers* (*Charles S. Skura*), 148 NLRB 679. In the present case the Board distinguished *Skura* on the ground that here the "union disciplinary action [was] aimed at defending [the union] from conduct which seeks to undermine its very existence" (154 NLRB at 696).

The Court of Appeals for the Third Circuit has rejected the Board's view that a union commits an unfair labor practice by disciplining a member for filing charges with the Board without exhausting internal union procedures. *Industrial Union of Marine and Shipbuilding Workers of America* v. *National Labor Relations Board*, 379 F. 2d 702. Simultaneously herewith, the Board is filing a petition for a writ of certiorari to review that decision.

Because of the close relation between the issue in this case and that in the case in which we are seeking review, we do not oppose the petition here.

Respectfully submitted.

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